

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
(Baltimore Division)

FILED

FEB 8 2001

U.S. BANKRUPTCY COURT
DISTRICT OF MARYLAND
BALTIMORE
DROP BOX

In re:

FRANK'S NURSERY & CRAFTS, INC.,
et al.,

Debtors.

Case Nos. 01-5-2415-JS through
01-5-2416-JS
(Chapter 11)
(Jointly Administered Under
01-5-2415-JS)

* * * * *

**DEBTORS' OPPOSITION TO MOTION OF CERTAIN UTILITY COMPANIES,
PURSUANT TO SECTION 366(B) OF THE BANKRUPTCY CODE AND
RULE 9024 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE,
TO DETERMINE ADEQUATE ASSURANCE OF PAYMENT AND TO
RECONSIDER AND/OR VACATE THE UTILITY ORDER**

Frank's Nursery & Crafts, Inc. and FNC Holdings, Inc., debtors and debtors in possession in the above-captioned case (collectively, the "Debtors"), by counsel, file this Response to Motion of Certain Utility Companies, Pursuant to Section 366(B) of the Bankruptcy Code and Rule 9024 of the Federal Rules of Bankruptcy Procedure, to Determine Adequate Assurance of Payment and to Reconsider and/or Vacate the Utility Order, and state:

Jurisdiction

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue of these cases and this Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

The Chapter 11 Cases

2. On February 19, 2001 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in this Court. The Debtors continue in possession of their respective properties and the management of their respective businesses as

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debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. The Debtors' chapter 11 cases have been consolidated for procedural purposes only.

3. On March 8, 2001, this Court entered a final order approving an up to \$100 million debtor-in-possession financing facility with a syndicate of lenders led by Wells Fargo Retail Finance, Inc. ("Wells Fargo") as agent.

4. On March 9, 2001, the United States Trustee appointed an official committee of unsecured creditors (the "Committee") in these cases.

The Debtors and Their Business Operations

5. Frank's, founded in 1949, operates the largest United States chain (as measured by sales) of specialty retail stores devoted to the sales of lawn and garden products. Lawn and garden products include green and flowering plants for outdoor and indoor usage, live landscape products such as trees and shrubs, fertilizers, seeds, bulbs, gardening tools and accessories, planters, watering equipment, garden statuary and furniture, wild bird food and feeders, mulches and specialty soils. Frank's also is a leading retailer of Christmas Trim-A-Tree merchandise, artificial flowers and arrangements, garden and floral crafts, and home decorative products. FNC (formerly known as General Host Corporation) is the sole shareholder of Frank's.

6. As of the Petition Date, Frank's operated 217 retail stores in 15 states, primarily in the Mid-Atlantic, Midwest and Northeast. At that time, an additional 44 stores were being closed as part of a previously announced plan to sell under-performing store locations. In its fiscal year ending January 28, 2001, Frank's had sales of approximately \$435 million. Currently, the Debtors employ approximately 1,900 full-time and 5,000 part-time employees. As of November 5, 2000, the book value of the Debtors' assets was approximately \$471.9 million and total debt was approximately \$338.3 million.

7. The Debtors' sales are seasonal. Their lawn and garden revenues are concentrated principally in the Spring and, to a lesser extent, in the Fall. Trim-A-Tree sales occur between Thanksgiving and Christmas.

8. During most of the first half of 2000, weather patterns hurt lawn and garden product sales across the Debtors' principal markets. During the third quarter of 2000, the Debtors decided to close 44 under-performing stores, liquidate their inventories, and sell the closed stores owned by the Debtors. Later in 2000 it became apparent that the Debtors' Trim-A-Tree holiday season sales were below expectations, which was consistent with the general softness in sales at retailers during this period.

9. In 2001, notwithstanding excess borrowing availability under their existing bank credit facilities, the Debtors were unable to draw down sufficient funding to meet the Debtors' working capital needs. Also, after access to their credit facilities had been curtailed, the Debtors were unable to secure additional prepetition funding to meet their working capital needs. Ultimately, the Debtors determined the most appropriate method to obtain such financing and achieve their restructuring objectives was through chapter 11 filings.

The Debtors' Utility Motion and the Utility Order

10. On February 19, 2001, along with a multitude of important and relatively typical "first day motions," the Debtors filed their Motion for Order: (A) Determining Adequate Assurance of Payment for Future Utility Services; and (B) Prohibiting Utility Companies from Altering, Refusing or Discontinuing Service to the Debtors Pursuant to Section 366 of the Bankruptcy Code (the "Utility Motion").

11. On February 20, 2001, after a hearing participated in by the United States Trustee and the Preliminary Official Creditors' Committee, this Court entered an Order: (A) Determining

Adequate Assurance of Payment for Future Utility Services; and (B) Prohibiting Utility Companies from Altering, Refusing or Discontinuing Service to the Debtors Pursuant to Section 366 of the Bankruptcy Code (the “Utility Order”). The Utility Order provides that any utility company seeking to challenge the Debtors’ presentation of adequate assurance of payment or which seeks to alter, refuse or discontinue any service to the Debtors shall not alter, refuse, or discontinue any service to the Debtors without further order of the Court upon a motion on not less than twenty days notice to parties in interest (a “Motion for Adequate Assurance”).

The Utilities’ Motion

12. On March 14, 2001, Dominion Virginia Power, Southern Connecticut Gas Company, Consumers Energy Company, Long Island Lighting Company d/b/a and KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery Long Island, Public Service Electric and Gas Company, GPU Energy, Central Hudson Gas and Electric Corporation, PECO Energy Company, Commonwealth Edison Company, and Consolidated Edison Company (collectively, the “Utilities”) filed their standard Motion of Certain Utility Companies, Pursuant to Section 366(B) of the Bankruptcy Code and Rule 9024 of the Federal Rules of Bankruptcy Procedure, to Determine Adequate Assurance of Payment and to Reconsider and/or Vacate the Utility Order (the “Utilities Motion”).¹

13. Through the Utilities’ Motion, the Utilities are requesting that the Court reconsider or vacate the Utility Order and award the Utilities huge and unwarranted post-petition deposits in the amounts set forth in the Utilities’ Motion. Essentially, the Utilities argue that the Utility Order: (1) it granted inappropriate injunctive relief on an *ex parte* basis; and (2) the relief

¹ The Utilities’ Motion was due to be filed by no later than March 2, 2001. As such, the Utilities’ Motion was not timely filed to seek reconsideration in accordance with Rule 59(e), made applicable to bankruptcy cases pursuant to Federal Rule of Bankruptcy Procedure 9023. See Van Skiver v. United States, 952 F.2d 1241, 1244 (10th Cir. 1992).

granted is contrary to the procedures established by Section 366 and the Utilities' right to request and obtain post-petition security from the Debtors. The Utilities further request the Court to order the Debtors to provide the Utilities with adequate assurance deposits of approximately \$819,340.00.

The Debtors' Opposition to the Utilities' Motion

I. The Utility Order Was Procedurally Proper.

14. The relief granted by the Utility Order is common based on a first day motion. Indeed, such relief is appropriate and necessary in large chapter 11 cases to prevent severe prejudice to the Debtors' estates.

15. Moreover, the Utility Order is procedural, not injunctive in nature. Thus, the Utility Order does not violate the rights of any utility to request and obtain post-petition security deposits from the Debtors. Rather, the Utility Order merely provides the Debtors the protections afforded under Section 366 by prohibiting utilities from imposing undue leverage and/or precipitously altering, refusing or discontinuing service to the Debtors without first seeking Court approval.

16. The specific relief mechanism of the Utility Order is to allow those utilities seeking additional adequate assurance to pursue such a request with the Court by filing an appropriate Motion for Adequate Assurance, like the instant Utilities Motion. The benefit of the Utility Order, therefore, is to protect all creditors and to provide a reasonable and responsible procedure to deal with the Debtors' hundreds of utility providers and the numerous issues involving post-petition utility services. The Utility Order, however, does not affect the substantive rights of any of the Utilities under bankruptcy law.

However, consistent with the Utility Order, the Debtors do not oppose the Court accepting the Utilities' Motion as a motion for adequate assurance.

17. Courts often require that a utility company seek Court approval prior to disconnecting service or otherwise exercising unilateral remedies. See Lloyd v. Champaign Telephone Co., 52 BR 653, 655 n.1 (Bankr. S.D. Ohio 1985).

18. Moreover, when Section 366 is applicable to a chapter 11 case, “the bankruptcy court must also . . . concern itself with the success of the rehabilitative process.” In re Utica Floor Maintenance, Inc., 25 B.R. 1010, 1013 (N.D. N.Y. 1982). Hence, the procedure outlined in the Utility Order is particularly appropriate under the circumstances here since there are hundreds of utility companies providing services to the Debtors and the altering, refusing, or discontinuation of services to the Debtors without notice to all interested parties could significantly impact the Debtors’ reorganization efforts and thereby harm all unsecured creditors.

19. Accordingly, the Utilities’ arguments that the Utility Order was entered on “an *ex parte* basis” and violates their right to request and obtain post-petition security from the Debtors is misplaced, especially since the remedial procedure set forth in the Utility Order for those utilities wishing to seek additional adequate assurance protects such utilities’ interests.

II. The Utilities are not in need of any post-petition security deposits at this time.

20. As confirmed in the Utilities’ Motion, the Court has discretion to make determinations regarding adequate assurance. See In re Utica Floor Maintenance, Inc., 25 B.R. 1010, 1016 (Bankr. N.D. N.Y. 1982). In the Utility Order, this Court already has suggested that filing a motion requesting additional adequate assurance should be limited to an exceptional circumstance, such as a post-petition default by the Debtors.

21. In the Utilities’ Motion, the Utilities do not and cannot state the Debtors are in arrears on any post-petition utilities payment. Correspondingly, the Debtors were current on all utility payments until just before their chapter 11 filings. Further, the Utilities cannot present

any other “exceptional circumstances” as grounds for the Utilities’ need for additional adequate assurance in the form of deposits.

22. Additionally, based upon the existence of the Debtors’ post-petition financing facility, in addition to the excess cash on hand and the daily revenues produced in the normal course of operations, the Debtors submit that sufficient funds are available to pay for post-petition utility service invoices rendered in the ordinary course of business. Such funding should be more than sufficient to satisfy the Utilities’ concerns with respect to post-petition services.

23. Equally significant, providing the requested deposits of over \$800,000.00 would necessitate the least productive use of the Debtors’ resources and harm the Debtors’ businesses and their creditors’ interests. Moreover, such relief would set a precedent for the Debtors’ other utilities and thereby potentially tie up millions of dollars. There are several other utilities who have contacted the Debtors requesting post-petition deposits. However, the Debtors are persuaded not to act in part based on the fact that no utility would receive a post-petition deposit.

24. Additionally, pursuant to the terms of Sections 503(b)(1) and 507(a)(1) of the Bankruptcy Code, the Utilities are entitled to an administrative expense priority for any claim against the Debtors in respect of post-petition utility services requested by the Debtors.

25. Given that (1) the Utilities have failed to state any factual allegations that the Debtors are in arrears with respect to any post-petition defaults; (2) the Debtors have sufficient liquidity to keep current on their post-petition utility payments; and (3) the Utilities will be entitled to an administrative expense claim for any unpaid post-petition bills, the relief requested by the Utilities should be denied.

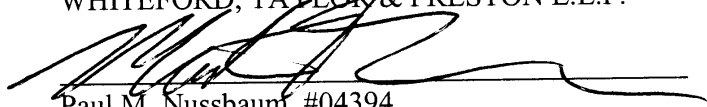
26. The Debtors reserve both their right to file a supplemental memorandum of law in support of this pleading and to present additional evidence to the Court at any scheduled hearing on this matter.

WHEREFORE, the Debtors respectfully request that an Order be passed denying the relief requested in the Utilities' Motion and granting such other and further relief as this Court may deem just and proper.

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CERTIFICATE OF SERVICE

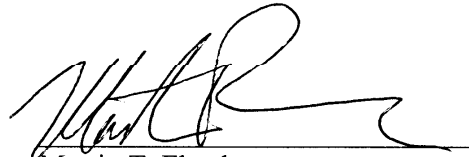
I certify that on this 2nd day of April, 2001, a copy of the foregoing pleading was sent first class mail, postage pre-paid to the parties listed below:

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